88-735

No.

Supreme Court, U.S.
FILED
OCT 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

vs.

ROLLAND A. NEVE,

Defendant/Appellant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROLLAND A. NEVE
Petitioner, Pro Per
4413 Elmwood Parkway
Metaire, Louisiana 70003
Telephone: (504) 888-3706

QUESTIONS PRESENTED

1. Whether a conviction for 26 U.S.C. 7203 cannot be had for failure to file an individual income tax return where the alleged income of the defendant is based on compensation for labor.

2. Whether affirming the petitioner's conviction in the face of a challenge for judicial misconduct without benefit of a sufficient record is a departure from accepted judicial practice requiring the exercise of this court's supervisory powers.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

vs.

ROLLAND A. NEVE,

Defendant/Appellant.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

A writ of certiorari is respectfully sought to review the Court of Appeals Order affirming the decision entered on July 5, 1988, by the Fifth Circuit Court of Appeals.

LIST OF PARTIES

The Parties to this action are:

Defendant/Appellant:

ROLLAND A. NEVE
4413 Elmwood Parkway
Metaire, Louisiana 70003
(504) 888-3706

Plaintiff/Appellee;

UNITED STATES OF AMERICA

HARRY W. MCSHERRY, JR.
Asst. U.S. Attorney
500 Camp Street
New Orleans, Louisiana 70130

TABLE OF CONTENTS

Questions Presented for Review

Petitioner for Writ of Certiorari

List of Parties

Table of Contents i

Table of Authorities. ii

Opinions Below. v

Jurisdiction. vi

Basis of Federal Jurisdiction . . . vi

Constitutional Provisions, Statutes, and Regulations Involved vii

Statement of Case 1

Reasons for Granting Writ. 3

Appendix A1

TABLE OF AUTHORITIES

U.S. Constitution

Art. 1, Sec. 8, Clause 1 20

Art. 1, Sec. 9, Clause 4 19

Sixteenth Amendment 3

Cases

Adkins v. Children's Hospital,
261 U.S. 525, 558 (1923). . . . 17

Bankers Trust Co. v. U.S.,
518 F.2d 1210 (1975). 18

Bar L Ranch, Inc. v. Phinney,
426 F.2d 995 (1970) 18

Boyle v. Mitchell,
247 U.S. 179 9

Brushaber v. Union Pacific R.R,
240 U.S. 1 (1916) 19

Champlin Refining Co. v. C.I.R.,
123 F.2d 202, 203 (1941). . . . 18

Coleman v. Alabama,
399 U.S. 1, 90 S.Ct. 1999 . . . 25

Commissioner v. Glenshaw Glass Co.,
348 U.S. 426, 431 (1955). . . 10,11

Conner v. U.S.,
303 F.Supp. 1187 (1969) . . . 12,13

Coppage v. Kansas,
236 U.S. 1, 14 (1914) 15

Eisner v. Macomber,
252 U.S. 189 (1920) . . . 7,9,10,21

Flint v. Stone Tracy Co.,
220 U.S. 107 (1911) 22

In Re Marshall,
102 F. 323, 324 F (1900). . . 15

In Re Tiburcio Parrott,
1 F. 481, 506 (1880). 14

In Re Williams' Estate,
256 F.2d 217 18

Jack Daniel Distillery v. U.S.,
379 F.2d 569 (1967) 18

Krulewitch v. U.S.,
336 U.S. 440, 453 (1948). . . 24

Lauredale Cemetary Assoc. v.
Matthews, 345 PA. 239,
47 A.2d 277, 280. 16

Lonsdale v. Commissioner,
661 F.2d 71, 72 (1981). 6

Merchant's Loan v. Smietanka,
255 U.S. 509 9

Penn Mutual Indemnity Co. v.
Commissioner, 32 T.C. (1959). . 21

Pollock V. Farmers' Loan & Trust Co.,
158 U.S. 601 (1895) 20

Oliver v. Halstead,
196 VA. 992, 86 S.E. 2d 858 . . 15

Slaughter-House Cases,
83 U.S. 36, 127 (1872). 15

So. Pacific v. Lowe,
247 U.S. 330. 9

Stanton v. Baltic Mining Co.,
240 U.S. 103, 112 (1916). . . . 21

Stratton's Indep. v. Howbert,
231 U.S. 406 9

Terrance Development Co. v. C.I.R.,
345 F.2d 933 (1965) 18

Towne v. Eisner,
245 U.S. 418. 9

United States v. Wade,
388 U.S. 218, 87 S.Ct. 1926 . . 25

Other Authorities

IRC, Section 61(a) 7

Tresury Regulation 26, C.F.R.,
Ch. 1, Section 1.61-2(a)(1) . . 8

House Report No. 1337; Senate Report
No. 1622; U.S. Code Cong. and Admin.
News, 83rd Congress, 2nd Session.
P. 4155 and 5802 respectively,
1954 9

OPINION BELOW

A Grand Jury indictment for Willful Failure to File Income Tax Returns was filed in the Eastern District of Louisiana. The jury returned its verdict of guilty on all counts. A copy of the trial court's Judgment and Probation/Commitment Order is attached as Appendix "A".

Defendant timely appealed his conviction to the Fifth Circuit Court of Appeals, which affirmed the judgment in its decision, attached as Appendix "B". The further decision denying petitioner's motions for rehearing and rehearing en banc was entered on August 31, 1988 and is attached as Appendix "C".

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on July 5, 1988. A Motion for Rehearing En Banc was filed August 18, and denied on August 31, 1988. The Supreme Court's jurisdiction is invoked pursuant to 28 United States Code Section 1254(1).

BASIS OF FEDERAL JURISDICTION

The United States Court of Appeals for the Fifth Circuit had jurisdiction over this case by virtue of 28 U.S.C. 1291.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

U.S. Const.amend. XVI.

STATUTES

Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) compensation for services, including fees, commissions, fringe benefits, and similar items.

26 USC Section 61(a)(1).

(a) **Computation of gain or loss.** The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 1011 for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.
26 USC Section 1001(a).

Basis of property--cost. The basis of property shall be the cost of such property, except as otherwise provided in this subchapter and subchapters C (relating to corporate distributions and adjustments), K (relating to partners and partnerships), and P. (relating to capital gains and losses). The cost of real property shall not include any amount in respect of real property taxes

which are treated under section 164(d) as imposed on the taxpayer.

26 USC, Section 1012.

(a) **General Rule.** Proper adjustment in respect of the property shall in all cases be made--

(1) for expenditures, receipts, losses, or other items, properly chargeable to capital account, but no such adjustment shall be made--

(A) for taxes or other carrying charges described in section 266, or

(B) for expenditures described in section 173 (relating to circulation expenditures), for which deductions have been taken by the taxpayer in determining taxable income for the taxable year or prior taxable years;

TREASURY REGULATIONS

(a) In general. (1) Wages, salaries, commissions paid salesmen, compensation for services on the basis of a percentage of profits, commissions on insurance premiums, severance pay, rewards, jury fees, marriage fees and other contributions received by a clergyman for services, pay of persons in the military or naval forces of the United States, retired pay of employees, pensions, and retirement allowances are income to the recipients unless excluded by law. Several special rules apply to members of the Armed Forces, Coast and Geodetic Survey, and Public Health Service of the United States; see paragraph (b) of this section.

Treasury Regulation 26, C.F.R., Ch.1, section 1.61-2(a)(1).

STATEMENT OF THE CASE

A. Course of proceedings and disposition in court below.

On April 9, 1987 a Grand Jury indictment was filed charging the defendant, Rolland Neve with six counts of willful failure to file income tax returns for the years 1980 through and including 1985. Arraignment was held April 29, 1987, a plea of not guilty was entered by order of the magistrate under Rule 11.

Trial began June 8, 1987 and the jury returned its verdict of guilty on all six counts on June 9. On August 19, 1987 the defendant was sentenced to one year custody as to count 1, to be confined for 4 months and remaining 8 months suspended. 5 years probation was ordered as to each of counts 2 through 6; to run concurrently and under count 2 the defendant was fined $5,000.00.

B. Statement of Facts.

The defendant is an individual private citizen of Louisiana who supports himself and his family as an independent contractor.

The record reflects that the defendant received compensation and it is undisputed that the amounts, if characterized as income, would have been sufficient to require filing a return each year under IRC Section 6012. However, prior to the indictment the government never responded to any of Mr. Neve's questions regarding the determination of such characterization. Mr. Neve, in reliance on decisions authored by the United States Supreme Court, held a good-faith belief that he was complying with the requirements of the law.

REASONS FOR GRANTING WRIT

I.

The Fifth Circuit Court of Appeals has affirmed the petitioner's conviction on charges of willful failure to file individual income tax returns based upon a determination that wages, or compensation for services, are encompassed within the meaning of the term "income" as used in the Sixteenth Amendment of the U.S. Constitution which provides for the taxation of income without apportionment regardless of its source. This ruling is contrary to this Court's determinations with regard to the definition of the term "income" in its constitutional sense in relation to restrictions of the federal taxing power. The Fifth Circuit's resolution of this federal question also conflicts with determinations by courts of last

resort in States which have reviewed the subject.

One of the fundamental rights which government has been instituted to protect under the design of the U.S. Constitution is petitioner's property interest in the finite amount of time and energy which constitutes his life. The petitioner contends that the expenditure of such property under contract for services constitutes a simple conversion of that property for compensation which cannot be construed as "income" for want of gain. To hold otherwise is contrary to long settle principles of the law as well as the equal protection provisions of the Fifth Amendment's due process clause, where the preservation of other property and rights of property are afforded by exemption from direct taxation without apportionment under Art. 1, of the U.S. Constitution.

Granted, authority for that proposition which permits the taxation of wages as income pursuant to the Sixteenth Amendment is extensive. Yet, such authority is readily apparent as the result of the application of legal misconceptions with regard to the nature of the tax as well as the nature of objects sought to be taxed. Thus, such authority, predicated upon faulty premises, is only superficial; calling for review by this Court in order to maintain the integrity of the judiciary.

Only three basic premises are identifiable as serving, either singly or in combination, as the supporting rationale in any case found to hold that wages do indeed constitute income. In regard to the characterization of wages it is first concluded that the subject is foreclosed simply by Congressional enactment of legislation on the matter which includes such compensation

specifically in its own definition of income at 26 U.S.C. 61(a). A second viewpoint rests on the arbitrary assumption of a zero-cost basis in the labor expended by the wage-earner in order to artificially justify the taxation of wages in conformance with the judicially established standard that income consists of gain. Finally, with regard to the nature of the tax itself, the Sixteenth Amendment has been misconstrued as eliminating the constitutional prohibition of direct taxation without apportionment. In the Fifth Circuit, Lonsdale v. Commissioner, 661 F.2d 71, 72 (1981) cited as the controlling case, is representative of the above contentions.

However, Lonsdale is not reliable because its determination is based upon the above erroneous conclusions that Congress has the power to define the term "income," and that the Sixteenth

Amendment eliminated apportionment. This conclusion is in direct conflict with the supreme court holding in the case of Eisner v. Macomber, 252 U.S. 189 (1920) that even Congress is constrained by the inclusion of the word "income" in the Constitution and must remain within the limits imposed by its constitutional meaning:

> "...it becomes essential to distinguish between what is and what is not 'income', as the term is there used; and to apply the distinction as cases arise, according to truth and substance, without regard to form. Congress may not by any definition it may adopt, conclude the matter, since it cannot by legislation alter the constitution, from which alone it derives its power to legislate, and within these limitations alone that power can be lawfully exercised. Id. at 206. (Emphasis added).

Section 61(a) of the Internal Revenue Code defines gross income as follows:

> Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) compensation

> for services, including fees, commissions, fringe benefits, and similar items.

26 U.S.C. Section 61(a)(1).

According to its regulation, the Internal Revenue Service takes the position that wages constitute income:

> Wages, salaries, commissions paid salesmen, compensation for services on the basis of a percentage of profits...are income to the recipients unless excluded by law.

Treasury Regulation 26, C.F.R., Ch.1, Section 1.61-2(a)(1).

What the Internal Revenue Service fails to inform us, however, is that the law does in fact exclude wages, salaries, commissions, etc. from income unless there is a "gain."

The meaning of a statute is to be determined from the intention of Congress in enacting it. For Section 61(a) of the Internal Revenue Code, the intention of Congress is set forth in both the Senate and House Reports which

accompanied the Internal Revenue Code of 1954:

> Section 61(a) provides that gross income includes "all income from whatever source derived." This definition is based upon the 16th Amendment and the word "income" is used in its constitutional sense.

House Report No. 1337; Senate Report No. 1622; U.S. Code Cong. and Admin. News, 83rd Congress, 2nd Session. P. 4155 and 5802 respectively, 1954.

The United States Supreme Court has provided us with the constitutional definition of income based upon the Sixteenth Amendment:

> Income may be defined as the gain derived from capital, from labor or from both combined, provided it include profit gained through a sale or conversion of capital assets.

Stratton's Indep. v. Howbert, 231 U.S. 406; Towne v. Eisner, 245 U.S. 418; Boyle v. Mitchell, 247 U.S. 179; So. Pacific v. Lowe, 247 U.S. 330; Eisner v. Macomber, 252 U.S. 189; Merchant's Loan v. Smietanka, 255 U.S. 509.

The Supreme Court in the Eisner case defined income from property as "... the gain derived from capital, from

labor, or from both combined" and as "a gain, a profit...proceeding from the property severed from the capital however invested or employed, and coming in, being 'derived,' that is received...that is income derived from property," Eisner, supra, p. 207. (Emphasis added). Not just any receipt "coming in" is income, but only "a gain, a profit...from property...coming in" is income from property in the constitutional meaning of the word. Receipts of gain from property, not receipts for property are income. Thus, in order wages to constitute income, there must be a gain derived from the labor which produces the wages.

In another leading case, Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955), the court addressed the issue of whether realized gains that involved no sources of property were also income. The Court

decided affirmatively and chose as working for income "accessions to wealth, clearly realized" (emphasis added). In using this phraseology, the Court was indicting that "wealth," the base line of value in their determination of a gain or accession, need not necessarily refer exclusively to capital or labor property that was invested, but could simply refer to the state of an individual prior to some fortuitous or "windfall" type of profit without property investment or loss, Glenshaw, supra, p. 429.

In the context of the petitioner's case, his labor is clearly the property source for gross receipts and, therefore, represents the wealth to which there must be an "accession" or "gain" if income is to be realized in those receipts. In fact, wages, far from being an accession to wealth, are receipts for lost wealth, that is, for

labor property lost to the employer. For this reason such receipts are inherently excluded from the category of income in spite of the failure of statutory law to specifically recognize the value of this type of loss.

The principle that receipts for property losses are not gain (income) is recognized in the case of Conner v. U.S., 303 F.Supp. 1187 (1969). The Court has to determine whether valuable receipts that were not statutorily excluded from income were in fact income in an instance in which they represented compensation for lost property. In that case the Plaintiff received $4,200.00 representing insurance compensation for financial losses of that amount. The court held that "the same logic on which" other specific statutory exclusions "are based would control the issue of judicial exclusion from gross income made to the plaintiff's here.

Congress has taxed income, not compensation." Id. at 1191. After an exhaustive search of the meaning of the word income in judicial history including both the Eisner and Glenshaw definitions, the Court decided that compensation for necessary financial expenditures was not gainful and, therefore, could not be classified as "income." The Court noted that "Income is nothing more or less than realized gain. It is not synonymous with receipts." Id., (Citations Omitted). The Court then concluded:

> Whatever may constitute income, therefore, must have the essential feature of gain to the recipient. This was true when the sixteenth amendment became effective, it was true at the time of the decision in Eisner v. Macomber, supra, it was true under Section 22(a) of the Internal Revenue Code of 1939, and it is likewise true under Section 61(a) of the Internal Revenue Code of 1954. If there is not gain, there is not income. Id.

The Conner Court obviously recognized the supremacy of the constitutional meaning of the word "income" over questionable statutory phraseology and clarified the ultimate logic which determines whether receipts are included or excluded from income, by simply referring to the definition of income. Far from being accessions to wealth, wage receipts are mere compensation for lost wealth (one's labor property), unless it be denied that the private use of the Plaintiff's time and energy is wealth or property to which he is entitled.

However, Plaintiff's labor is indisputably a property right which was lost by the Plaintiff to his employer. It has been long recognized that property is everything which has an exchangeable value. In Re Tiburcio Parrott, 1 F. 481, 506 (1880); Slaughter-House Cases, 83 U.S. 36, 127

(1872); In Re Marshall, 102 F. 323, 324 F (1900). The Supreme Court has also recognized that employer-employee agreements are essentially reciprocal property transfer contracts "by which labor and other services are exchanged for money and other forms of property," Coppage v. Kansas, 236 U.S. 1, 14 (1914). The Plaintiff's labor and his employer's money, both having exchangeable value, are equal property under the law.

Receipts which compensate a wage-earner for his labor expended (lost property) cannot be deemed as gains, profits or accessions to his expended labor. The Virginia State Supreme Court has held that:

> There is a clear distinction between "profit" and "wages" or compensation for labor. Compensation for labor cannot be regarded as profit within the meaning of the law.

Oliver v. Halstead, 196 VA. 992, 86 S.E. 2d 858.

In Pennsylvania, the Supreme Court held that "reasonable compensation for labor or services rendered is not profit", Lauredale Cemetary Assoc. v. Matthews, 345 PA. 239, 47 A.2d 277, 280.

This principle is found also in the statutory rule for the determination of gain from the loss of property which occurs in selling it. I.R.C. Section 1001(a), 1011(a), 1012 and 1016(a)(1), state, when taken together, that the gain from the sale of property shall be the excess of the amount realized therefrom over the cost of the property as it is adjusted for losses and expenditures. The portion of the receipts for property sold (lost) that represents a gain is determined by excluding the cost of that property from receipts, hence the portion of receipts, which compensates the seller from the value of his lost property, is not a gain.

Labor is a valuable property right which is lost in employment. Labor property is entitled to the same constitutional, statutory and case-law protection which is afforded to capital property in the determination of income. What is required of this Court is the determination of some clear standard by which the implicit value of labor may be made explicit.

The Supreme Court has already articulated the presence of such a standard by noting in Adkins v. Children's Hospital, 261 U.S. 525, 558 (1923), that there is in the exchange of capital and labor a "moral requirement implicit...that the amount to be paid and service to be rendered...." In singling out labor from all other forms of property, including capital, and in refusing to recognize its market value in determining its cost to the worker, evidences a deep discrimination against

the wage earner's form of property and denies him equal protection of law with respect to this form of property.

"Where property is given in exchange for other property, the cost of the property acquired is the value of the property given in exchange therefor." Champlin Refining Co. v. C.I.R., 123 F.2d 202, 203 (1941). See also, Terrance Development Co. v. C.I.R., 345 F.2d 933 (1965); Bankers Trust Co. v. U.S., 518 F.2d 1210 (1975); Bar L Ranch, Inc. v. Phinney, 426 F2d 995 (1970); Jack Daniel Distillery v. U.S., 379 F.2d 569 (1967); and In re Williams' Estate, 256 F.2d 217 (1958). The value of the labor loss, therefore, is the amount received in compensatory wages.

To tax a receipt for compensation is to directly tax the property source. This is the precise result which the Sixteenth Amendment intended to prevent.

The Supreme Court in Brushaber v. Union Pacific R.R., 240 U.S. 1 (1916) noted with regard to the purpose of the Sixteenth Amendment:

> "...a condition which clearly demonstrates that the purpose was not to change the existing interpretation except to the extent necessary to accomplish the result intended, that is, the prevention of the resort to the sources from which a taxes income was derived in order to cause a direct tax on the income to be a direct tax on the source itself and thereby to take an income tax out of the class of excises, duties and imposts and place it in the class of direct taxes." 240 U.S. at 19.

The direct taxation of wages without apportionment is in violation of the prohibition of the United States Constitution, Art.1, sec. 9, clause 4, contrary to the assertion made in Lonsdale. Article 1 mandates how taxes are to be laid and collected, Section 9, Clause 4 provides that "No capitation, or other direct tax shall be laid, unless in Proportion to the Census or

Enumeration hereinbefore directed to be taken." Indirect taxes are authorized under Article 1, Section 8, Clause 1 with the limitation that "all Duties, Imposts and Excises shall be uniform throughout the United States."

The result intended from the 16th Amendment was to keep the income tax subject to Article 1, Section 8, of the Constitution by keeping it an indirect tax from the source, by separating the source from the income, thereby preventing a direct tax on the source, Brushaber, supra.

In Pollock v. Farmers'Loan & Trust Co., 158 U.S. 601 (1895), the Income Tax Act of 1894 was declared invalid because it failed to separate the source of the income, from the income itself, which resulted in the unconstitutional taxing of both the source and the income. The express purpose of the 16th Amendment was to avert once and for all the issue

presented in Pollock, supra., i.e., under the 16th Amendment, income and property are not synonymous.

In Stanton v. Baltic Mining Co., 240 U.S. 103, 112 (1916) this Court stated:

> ...(t)he 16th Amendment conferred no new power of taxation, but simply prohibited the previous complete and plenary power of income taxation possessed by Congress from the beginning from being taken out of the category of indirect taxation to which it inherently belonged.

In Eisner, supra, the Court said:

> The Sixteenth Amendment must be construed in connection with the taxing clauses of the original Constitution and the effect attributed to them before the amendment was adopted.

The U.S. Tax Court, in Penn Mutual Indemnity Co. v. Commissioner, 32 T.C. (1959), CCH at page 659 conceded that "the source of the taxing power is not the 16th Amendment. It is Article 1, Section 8, of the Constitution".

Whatever constitutes a proper subject from whence to exact an excise tax, therefore, is a limitation upon the taxing power conferred under the 16th Amendment. In Flint v. Stone Tracy Co., 220 U.S. 107 (1911) the Supreme Court noted the proper subjects:

> Excises are 'taxes laid upon the manufacture, sale, or consumption of commodities within the country, upon licenses to pursue certain occupations, and upon corporate privileges.' 220 U.S. at 151.

The pecuniary compensations which natural persons receive from salaried employments, wages and occupations are conspicously absent from the foregoing enumeration of proper subjects of excise taxes. What has occurred is that Congress has unilaterally and without authority imposed a direct tax upon wages; an excessive use of power, unsupported by either the Sixteenth Amendment or the Case law.

II

The Fifth Circuit affirmed the petitioner's conviction without adequate appearance on the record of facts from which to determine whether the trial judges behavior unduly influenced the jury and thereby deprived the petitioner of the right to a fair trial. This action conflicts with other decisions requiring a remand to the trial court for the purpose of establishing necessary factual determinations upon an evidentiary hearing. It is a departure from accepted judicial procedure which requires intervention of the exercise of this Court's supervisory power.

The Fifth Circuit Court of Appeals acknowledged that analysis of the impact of of the trial judges movements and expressions on the fairness of the trial is difficult. Yet, the petitioner's assertions that Judge Duplantier's obvious bias toward him was communicated

to the jury by such conduct were dismissed on appeal as cured by a "reasonable" explanation given at the end of trial as well as admonitions to the jury to disregard judicial indications of the defendant's guilt (Appendix B, p.14). However, this Court has said:

> The naive assumption that prejudicial effects can be overcome by instructions to the jury...all practicing lawyers know to be unmitigated fiction.

Krulewitch v. U.S., 336 U.S. 440, 453 (1948).

Judge Duplantier admitted his bias toward the defendant for pressing his theory that wages cannot be taxed as income as a basis of his defense, Appendix D. His attitude was undeniably conveyed to the jury throughout the trial. Rather than assuming tha the actions of the judge were cured by his instructions the Fifth Circuit should have remanded the matter for an

evidentiary hearing. See, United States v. Wade, 388 U.S. 218, 87 SCt 1926; Coleman v. Alabama, 399 U.S. 1, 90 SCt. 1999.

Respectfully submitted this 28 day of October, 1988.

Rolland Neve

Rolland Neve
Petitioner

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA,

Plaintiff/Appellee

VS. CRIMINAL ACTION NO. CRM. 87-221 "H"

ROLLAND A. NEVE,

Defendant/Appellant

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government, the Defendant appeared in person on this date - August 19, 1987.

WITH COUNSEL: Samuel Coon, Esq.

PLEA:

FINDING & JUDGMENT:

There being a verdict of GUILTY to counts 1 through 6. Defendant has been convicted as charged of the offense of Title 26, U.S.C., Section 7203 as charged in the indictment.

SENTENCE OR PROBATION ORDER:

The defendant is sentenced to one (1) year on count 1, to be confined in a jail-type or treatment institution for a period of four (4) months, specifically in the Volunteers of America Community Residential Center, 1002 Napoleon Ave., New Orleans, La. 70115, execution of remainder of sentence is suspended and the defendant is placed on active probation for a period of eight (8) months. As to each of counts 2 through 6, imposition of sentence if(sic) suspended and the defendant is placed upon active probation for a period of five (5) years, to commence upon defendant's release from custody. Counts 3 through 6 to run concurrently with count 2. As to count 2, defendant is fined $5,000.00, to be paid within the first two (2) years of probationary period. Defendant to self-surrender Sept. 18, 1987.

IT IS FURTHER ORDERED that as special conditions of probation the defendant file all past due income tax returns and file on current basis during period of probation; pay all back taxes, interest and penalties due the Government on back taxes in indictment as well as those not covered by indictment as determined by IRS; cooperate with the IRS in its efforts to determine taxes and penalties if called upon; pay prosecution costs to Government as determined by the Government.

DATE OF ENTRY AUG 20 1987

August 19, 1987

APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 87-3637
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROLLAND A. NEVE,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana
(CR-87-221-H)

(July 5, 1988)

Before GEE, GARWOOD, and JONES, Circuit Judges. PER CURIAM:*[1]

---

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

A jury found Rolland Neve guilty of six counts of willful failure to file federal income tax returns for 1980-1985, inclusive. The district court sentenced Neve to one year of confinement for Count 1, with four months to be served at the Volunteers of America Community Residential Center, and suspended the remainder of the sentence with conditions. The district court also suspended sentence for Counts 2-6 with conditions and fined Neve $5,000. The issues Neve raises on appeal verge on the frivolous, and we affirm.

Neve concedes that he did not file an individual income tax return on or before April 15 for each year from 1980 through 1985. He earned over $300,000 during these years. Neve concedes that the amount of his wages or compensation for services, if viewed as income, would have been sufficient to require filing

federal income tax returns for each of those years.

Neve cites the Sixteenth Amendment and a number of cases to support his argument that compensation for services or wages does not constitute income for federal income tax purposes. None of the authorities cited by Neve explicitly adopt this argument. In **Lonsdale v. Commissioner**, 661 F.2d 71, 72 (5th Cir. 1981), this Court held that compensation for services constitutes income for federal income tax purposes.

The standard of review is whether, considering all of the evidence in the light most favorable to the prosecution, a rational factfinder could have found the defendant guilty beyond a reasonable doubt based on the evidence presented at trial. **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979); **United States v. Bell**, 678, F.2d 547, 549 (5th Cir. 1982) (en banc), **aff'd**,

462 U.S. 356, 1035 S.Ct. 2398 (1983). Neve argues that the evidence fails to establish that he acted with the required **mens rea** element of willfulness. **See** 26 U.S.C. Sec. 7203.

In **United States v. Wade**, 585 F.2d 573, 574 (5th Cir. 1978), **cert. denied**, 440 U.S. 928, 99 S.Ct. 1264 (1979), this Court held that "ample" evidence supported a jury's finding of willful failure to file federal income tax returns for 1972 and 1973. This Court relied on the following evidence as to Wade's willfulness: (1) Wade filed federal income tax returns in 1968 and 1969, and (2) the Internal Revenue Service had sent Wade a letter in 1974 advising him that his 1973 return, which asserted a Fifth Amendment privilege and contained no financial information, did not comply with tax laws and would subject him to criminal penalties unless corrected.

Under **Wade**, the evidence as to Neve's willfulness is sufficient. Neve filed federal income tax returns before 1975. On three separate occasions prior to 1985, the U.S. Tax Court alerted Neve to his obligations to file federal income tax returns and told him that there were deficiencies in his federal income tax payments. Also, on two different occasions, the U.S. Tax Court specifically informed Neve that his "wages are not income" argument is frivolous. In addition, in 1984, the IRS informed Neve that a criminal investigation had been commenced against him for failure to file income tax returns. Also, prior to 1980, Neve knew that he had the option of filing income tax returns, paying his federal income tax, and suing in federal district court on his constitutional theories.

In his reply brief, Neve argues that the jury's finding as to

willfulness might have been different if a letter that he received from an attorney had been admitted into evidence. Neve alleges that the letter substantiates his legal arguments. Neve does not specifically identify the ruling in question, but he may be referring to his attempt to introduce into evidence a letter sent to him by an attorney on April 4, 1987 which was held inadmissable on relevancy grounds. Since the charges against Neve relate to his willful failure to file returns for 1980 through 1985, the district court correctly ruled that the April 4, 1987 letter is irrelevant. See FED. R. EVID. 401-02.

Neve argues that the district court did not have jurisdiction to convict him because the Government should have exhausted administrative remedies prior to his criminal trial. Neve bases his argument on procedural due process

rights to notice and to an opportunity to be heard. The focal point of Neve's argument is that he "was never afforded an oral hearing prior to the referral for criminal investigation." Neve fails to mention, however, that prior to the instigation of criminal procedures against him, the U.S. Tax Court told him on two different occasions that his argument on the merits (wages are not income for federal income tax purposes) is frivolous. Neve does not explain how another pre-criminal proceedings would have affected him.

Nor does Neve cite any authority requiring administrative hearings prior to criminal procedures in the present type case. In **United States** v. **Drefke**, 707 F.2d 978, 981 (5th Cir.), **cert. denied sub. nom. Jameson** v. **United States**, 464 U.S. 942, 104 S.Ct. 359 (1983), this Court held that the district court had jurisdiction to

convict Drefke for willful failure to file federal income tax returns, and that an administrative hearing regarding the IRS's jurisdiction over Drefke was not required because the Internal Revenue Code does not mandate such a hearing. Similarly, here, Neve cites no Internal Revenue Code provision requiring exhaustion of administrative remedies prior to valid criminal proceedings and we are aware of none. The district court had jurisdiction to convict Neve, and a prior exhaustion of administrative remedies is not required.

Neve contends next that the conduct of the district court judge denied him a fair trial. In reviewing whether a district judge's conduct and comments during the trial deprived the party of his constitutional rights to a fair trial and due process, this court reviews the proceedings as a whole to determine whether the judge's behavior

was so prejudicial as to deny the party "'a fair, as opposed to a perfect, trial.'" **United States v. Williams**, 809 F.2d 1072, 1086, 1989 (5th Cir.), **rehearing granted on other grounds**, 828 F.2d 1 (5th Cir.), **cert. denied**, _____ U.S. _____, 108 S.Ct. 259 (1987) (**quoting United States v. Pisani**, 773 F.2d 397, 402 (2d Cir. 1985)). We have carefully reviewed the record concerning each of the matters raised by Neve, and only two of them deserve extended discussion. Throughout most of his exchanges with Neve's counsel, the trial judge was, if at some times rather abrupt in manner, nevertheless accurately stating the law.

At one point, the court misinterpreted testimony of a defense witness that bore on Neve's reputation for honesty, and commented:

> The Court: Well let me just tell the jury that that question, 'the gentleman is honest,' is not a proper

> question for somebody to ask a character witness. He may testify about what he understands his reputation to be, and that's it.

The court properly stated the nature of character evidence. **See** FED. R. EVID. 608(a). An observant juror would have understood that the judge did not hear the testimony accurately. We do not find in this momentary error evidence of substantial bias against Neve.

Neve also argues that the judge's movements of his hands, his facial gestures, body posture and walking around during presentation of the defense case, along with his language and inclination of voice, indicated to the jury that the judge was prejudiced against Neve. The court responded to this objection at trial as follows:

> I stand up from time to time because I have a spondylolisthesis condition which I have had for a long time in my back which requires me absolutely to stand up from

> time to time during trial, and the Court of Appeals ought to know it.
>
> Counsel made some comment about facial gestures. I don't have a mirror in front of me, so, it's hard for me to tell what he's talking about. I may say that I might have responded with a facial gesture to some of counsel's own facial gestures directed to me and to the jury which bordered on the contumacious when I made rulings. Counsel made the point also that Iwas apparently infuriated by him. I only say for the record that it would take a great deal more than whatever he could do to infuriate me as a Judge.

This Court always finds it difficult to analyze whether movements and facial expressions of the trial judge could deprive a party of his constitutional right to a fair trial. Nevertheless, the trial judge here reasonably explained his behavior and instructed the jury several times to disregard his admonishments to counsel and not to take his comments as indicating any view on the guilt or innocence of the defendant.

Neve has not persuaded us that he was unfairly tried.

The judgment of the district court is **AFFIRMED.**

APPENDIX "C"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-3637

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROLLAND A. NEVE,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

---

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 07/05/88, 5 Cir., 198_, _____ F.2d _____)

(August 31, 1988)

Before GEE, GARWOOD and JONES, Circuit Judges. PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be

polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Re-hearing En Banc is DENIED.

ENTERED FOR THE COURT:

_____

(Edith H, Jones 8/29/88)
United States Circuit Judge

APPENDIX "D"

I also tell you, whether you agree with this or not, you leave here today a fortunate man, because if I had to sentence you at the conclusion of the trial, you're sentence would have been at least a year, and probably more than that in a typical jail-type institution. My change of heart is based not so much upon any letters that I have read, though I tell you again, they are impressive, and you should be proud that you have friends, and grateful that you have friends who will stand by you in that fashion -- but, my change of heart is based, instead, upon the fact that when I finished the trial, I was unable to understand the position that you took, and was unable to credit it any way. I still am unable to understand it, but I'm giving you competely the benefit of any doubt that I have still that your position was sincere.

When we finished the trial, I was completely convinced that it was an insinere position. I no longer am completely convinced of that, and I impose this sentence on the assumption that the position was entirely sincere, and that conviction, that doubt in my mind was brought about by reading the letters that were submitted to me by people to me on your behalf, and by simple reflection that I had the opportunity to engage in since the trial.